24TH FEDERAL LITIGATION COURSE

EXHAUSTION OF MILITARY ADMINISTRATIVE REMEDIES

I. INTRODUCTION.

The doctrine of exhaustion of administrative remedies provides that an available administrative remedy must be pursued before seeking relief in court. This judge-made rule is well established in federal jurisprudence, and was, until 1993, the general rule for plaintiffs seeking civil relief from the government. That year, in the case of *Darby v. Cisneros*, 509 U.S. 137 (1993), the U.S. Supreme Court ruled that the exhaustion doctrine was incorporated into the Administrative Procedure Act (APA) (i.e., as a statutory rule) in such a way that it applies *only when required by agency rule* (the case is discussed below). In other words, the agency's rules themselves must require the exhaustion of administrative remedies; if the rules do not make that an explicit requirement, plaintiffs have the option of bypassing the administrative process and proceeding directly to court. *Darby* did not involve construing military regulations, so the question for military practitioners becomes how to distinguish our unique interests from other agencies' situations in cases brought under the APA.

II. THE GENERAL LAW OF EXHAUSTION (PRE *DARBY)*

A. The Majority Rule: A plaintiff must exhaust military administrative remedies before challenging a military decision in the federal courts. See, e.g., Duffy v. United States, 966 F.2d 307 (7th Cir. 1992); Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991); Navas v. Vales, 752 F.2d 765 (1st Cir. 1985); Ballenger v. Marsh, 708 F.2d 349 (8th Cir. 1983); Linfors v. United States, 673 F.2d 332 (11th Cir. 1982); Von Hoffburg v. Alexander, 615 F.2d 633 (5th Cir. 1980); Diliberti v. Brown, 583 F.2d 950 (7th Cir. 1978).

B. The Minority Rule (Federal Circuit Rule): Recourse to military administrative remedies is permissive, not mandatory. Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986); Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983); Mathis v. United States, 391 F.2d 938 (Ct. Cl.), vacated on other grounds, 394 F.2d 519 (Ct. Cl. 1968); Wyatt v. United States, 23 Cl. Ct. 314 (1991).

C. In **APA cases** exhaustion is required only when specified by statute. Darby v. Cisneros, 509 U.S. 137 (1993).

1. Federal courts do not have the authority to require a plaintiff to exhaust available administrative remedies before seeking judicial review under the APA, where it is not otherwise required by statute or regulation.

2. A statute, 5 U.S.C. § 704 (Actions Reviewable), overrides previous (pre-Darby) judicial doctrine: "[e]xcept as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section . . . unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

3. Distinguishing Darby – it may have limited applicability to the military, although the majority of reported decisions do not recognize a military exception. See, *e.g.*, the following:

a. Military exception recognized: Saad v. Dalton, 846 F. Supp. 889 (S.D. Cal. 1994). The court distinguished Darby, holding that "review of military personnel actions . . . is a unique context with specialized rules limiting judicial review." citing Chappell v. Wallace, 462 U.S. 486 (1983).

b. Military exception not recognized: Daugherty v. United States, 212 F.Supp.2d 1279 (N.D. Okla. 2002); Crane v. Secretary of the Army, 92 F.Supp.2d 155 (W.D.N.Y. 2000); St. Clair v. Secretary of the Navy, 970 F.Supp. 645 (N.D.Ill. 1997); Perez v. United States 850 F. Supp. 1354 (N.D. Ill. 1994).

c. In appropriate cases, the military services should continue to assert the exhaustion doctrine as a defense. Seek to distinguish Darby--which was not a military case--when a plaintiff raises it. *See* E.Roy Hawkens, *The Exhaustion Component of the Mindes Justiciability Test is Not Laid to Rest by Darby v. Cisneros*, 166 Mil. L. Rev. 67 (2000).

(1) The case may be based in part upon non-APA grounds (e.g., constitutional grounds). *See* Cunningham v. Loy, 76 F.Supp.2d 218 (D.Conn. 1999)(Exhaustion of remedies before CGCMR required in mandamus action seeking military promotion).

(2) Congress has established a comprehensive system of review (the military services' Corrections Boards) that thereby requires administrative review before litigation.

(3) The military is a specialized society requiring special rules.

III. Purposes of the Exhaustion Requirement. McKart v. United States, 395 U.S. 185 (1969).

A. Efficiently allocate judicial resources.

B. Avoid needless litigation.

C. Prepare a record.

D. Focus issues.

E. Apply agency expertise.

F. Avoid interference with the agency until the action is completed or authority is exceeded.

G. Permit agencies to discover and correct own errors.

H. Avoid flouting of the administrative process.

I. Jurisdictional Nature of Exhaustion Requirement. Compare Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974), with Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978).

IV. WHAT REMEDIES MUST BE EXHAUSTED?

A. Boards for Correction of Military Records. 10 U.S.C. § 1552.

--Army Board for Correction of Military Records (ABCMR): 32 C.F.R. § 581.3; AR 15-185.

--Board for Correction of Naval Records (BCNR): 32 C.F.R. Part 723.

--Air Force Board for Correction of Military Records (AFBCMR): 32 C.F.R. Part 865, Subpart A; AFR 31-3.

1. Nature of the remedy.

a. The statute:

> "The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. . . [S]uch corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department."
>
> -- 10 U.S.C. § 1552(a).

2. Scope of the remedy.

3. Composition and procedure.

4. Necessity for recourse to the BCMR/BCNR.

a. General requirement. Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986); Hodges v. Callaway, 499 F.2d 417 (5th Cir. 1974); Martin v. Stone, 759 F. Supp. 19 (D.D.C. 1991).

b. Need to exhaust intermediate remedies. Sherengos v. Seamans, 449 F.2d 333 (4th Cir. 1971); 32 C.F.R. §§ 581.3(c)(3), 723.3(c), and 865.9

5. Review of courts-martial.

a. Background. Baxter v. Claytor, 652 F.2d 181 (D.C. Cir. 1981); Military Justice Act of 1983, Pub. L. No. 98-209, §§ 11(a), 11(b), 97 Stat. 1407 (codified as 10 U.S.C. §§ 1552(f), 1553(a)). See also Stokes v. Orr, 628 F. Supp. 1085 (D. Kan. 1985).

b. Obligation to seek relief before correction board before collaterally challenging court-martial conviction. Cooper v. Marsh, 807 F.2d 988 (Fed. Cir. 1986).

B. Discharge Review Boards. 10 U.S.C. § 1553; 32 C.F.R. Part 70; DOD Dir. 1332.28.

--Army Discharge Review Board (ADRB): 32 C.F.R. § 581.2; AR 15-180.

--Navy Discharge Review Board (NDRB): 32 C.F.R. Part 724.

--Air Force Discharge Review Board (AFDRB): 32 C.F.R. Part 865, Subpart B; AFR 20-10.

1. Nature of the remedy.

a. The statute:

> " The Secretary concerned shall . . . establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his department upon its own motion or upon the request of the former member. . . ."
>
> -- 10 U.S.C. § 1553(a).

2. Scope of the remedy.

3. Composition and procedure.

4. Necessity for recourse to the DRB. Pickell v. Reed, 326 F. Supp. 1086 (N.D. Cal.), aff'd, 446 F.2d 898 (9th Cir.), cert. denied, 404 U.S. 946 (1971); Michaelson v. Herren, 242 F.2d 693 (2d Cir. 1957).

C. Article 138, UCMJ. 10 U.S.C. § 938.

1. Nature of the remedy.

a. The statute:

> "Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon."
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> -- 10 U.S.C. § 938.

b. Scope of the remedy.

c. Procedure.

d. Necessity for recourse to Article 138. Woodrick v. Ungerford, 800 F.2d 1413 (5th Cir. 1986), cert. denied, 481 U.S. 1036 (1987); McGaw v. Farrow, 472 F.2d 952 (4th Cir. 1972); Adkins v. United States Navy, 507 F. Supp. 891 (S.D. Tex. 1981).

D. Clemency Boards. 10 U.S.C. §§ 874, 951-954. Kaiser v. Secretary of the Navy, 542 F. Supp. 1263 (D. Colo. 1982).

E. Inspector General. 10 U.S.C. § 3039.

F. Other Remedies.

V. EXCEPTIONS TO THE EXHAUSTION DOCTRINE.

A. General.

1. Inadequacy. Von Hoffburg v. United States, 615 F.2d 633 (5th Cir. 1980); Steffan v. Cheney, 733 F. Supp. 115 (D.D.C. 1989).

2. Futility. Compare Watkins v. United States Army, 541 F. Supp. 249 (W.D. Wash. 1982) and Steffan v. Cheney, 733 F. Supp. 115 (D.D.C. 1989) with Schaefer v. Cheney, 725 F. Supp. 40 (D.D.C. 1989). Cf. Guerra v. Scruggs, 942 F.2d 270 (4th Cir. 1991).

3. Irreparable injury. Hickey v. Commandant, 461 F. Supp. 1085 (E.D. Pa. 1978).

4. Purely legal issues. Committee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975); Downen v. Warner, 481 F.2d 642 (9th Cir. 1973).

5. Avoiding piecemeal relief. Walters v. Secretary of the Navy, 533 F. Supp. 1068 (D.D.C. 1982), rev'd on other grounds, 725 F.2d 107 (D.C. Cir. 1983).

VI. EXHAUSTION AND THE STATUTE OF LIMITATIONS

A. General.

1. Judicial statute of limitations, 28 U.S.C. § 2401(a) -- six years from accrual of the claim. See, e.g., Geyen v. Marsh, 775 F.2d 1303 (5th Cir. 1985); Walters v. Secretary of Defense, 725 F.2d 107 (D.C. Cir. 1983); Arko v. United States Air Force Reserve Officer Training Program, 661 F. Supp. 31 (D. Colo. 1987). But see Wood v. Secretary of Defense, 496 F. Supp. 192 (D.D.C. 1980).

2. Administrative statute of limitations:

a. Correction boards -- three years. 10 U.S.C. § 1552(b).

b. Discharge review boards -- 15 years. 10 U.S.C. § 1553(a).

B. Exhaustion is permissive--cause of action accrues on the date of the adverse action. Martinez v. United States, 333 F.3d 1295 (Fed. Cir. 2003); Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986); Bonen v. United States, 666 F.2d 536 (Ct. Cl. 1981), cert. denied, 456 U.S. 991 (1982); Brewster v. Secretary of the Army, 489 F. Supp. 85 (E.D.N.Y. 1980).

C. Exhaustion is mandatory--cause of action accrues after remedy exhausted. See Guitard v. Secretary of the Navy, 967 F.2d 737 (2d Cir. 1992); Blassingame v. Secretary of the Navy, 811 F.2d 65 (2d Cir. 1987); Smith v. Marsh, 787 F.2d 510 (10th Cir. 1986); Dougherty v. United States Naval Bd. for Correction of Naval Records, 784 F.2d 499 (3d Cir. 1986); Geyen v. Marsh, 775 F.2d 1303 (5th Cir. 1985); Cf. Guerrero v. Marsh, 819 F.2d 238 (9th Cir. 1987) (court can order correction board to decide whether to waive administrative statute of limitation).

1. Theory: The federal court is reviewing the administrative board's refusal to grant an application for relief; it is not reviewing the underlying adverse action that was the basis of the application for administrative relief.

   a. Scope of review: Limited to the administrative record.

   b. Scope of relief: nonmonetary.

2. What about successive applications to the Correction Board? Compare Yagjian v. Marsh, 571 F. Supp. 698 (D.N.H. 1983); Kaiser v. Secretary of the Navy, 525 F. Supp. 1226 (D. Colo. 1981); Mulvaney v. Stetson, 470 F. Supp. 725 (N.D. Ill. 1979), with Nichols v. Hughes, 721 F.2d 657 (9th Cir. 1983); Ballenger v. Marsh, 708 F.2d 349 (8th Cir. 1983); Bethke v. Stetson, 521 F. Supp. 488 (N.D. Ga. 1979), aff'd, 619 F.2d 81 (5th Cir. 1980).

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